IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 355 of 1994

Kamleshbai Rajkumar Dixit ... Appellant

V/s

The State of Maharashtra .. Respondent

Shri P.P.Hudlikar with Mrs.S.Goswami for Appellant

Shri R.Y.Mirza, APP for Respondent

CORAM:S.S.PARKAR AND

S. R. SATHE,JJ.

DATED:7th October 2004

ORAL JUDGMENT : (Per S.R.SATHE, J.)

1. The Appellant original accused in Sessions Case No.645 of 1987 has preferred this Appeal against the judgment and order passed by the Sessions Judge, Thane whereby the accused was convicted for the offence punishable under section 302 of IPC and sentenced to suffer imprisonment for life and fine of Rs.200/- in default to suffer r/i for 3 months.

2. The brief facts giving rise to the present appeal are as under:-

. The marriage of deceased Anita had taken place on 4-3-1984 with son of the accused viz. Chandrakishor. After marriage she started residing with her husband at Palghar. Her mother in law i.e. accused, the father in law and sister in law were also residing in the same house. For initial period of about 6 months her in laws treated her well. During that period the younger son of the husband of deceased died due to drowning. Since then the mother in law started blaming the deceased as a woman of bad omen and on that count she started harassing her. She also used to say that deceased should reside separate and for that purpose bring money from her parents. Deceased was in fact not in a position to bring money. Hence on that count the mother in law often used to abuse and ill-treat the deceased. It is the prosecution case that on 16-12-1986 the deceased was not feeling well and for that purpose she had gone to doctor. After returning home at about 7-30 p.m. when she was lying on a cot her mother in law i.e. accused again started abusing her and said that she should reside separately. When deceased was lying on the cot the accused poured kerosene on her person and she was set on fire with lighted match stick. Since deceased sustained burn injuries she started shouting. After extinguishing the fire she was taken to KEM

Hospital, Parel. At that time she was unconscious and not in a position to make any statement. The person who had taken her to the hospital gave history of sustaining burns due to accident.

3. In the meantime the husband of deceased went to parents of the deceased and informed them about the burn injuries sustained by the deceased. Naturally, they immediately rushed to K. E. M. Hospital, Parel on 17-12-1986. Anita regained consciousness on 19-12-1986. Naturally at that time the Special Executive Magistrate was called to record the dying declaration of the deceased. Accordingly Mahadeo G. Gawade, Special Executive Magistrate went to KEM Hospital, Parel and after disclosing his identify and completing all the formalities he recorded the statement of the deceased, wherein she clearly told the Special Executive Magistrate that on the day of incident at about 7-30 p.m. when she returned from the doctor and lying on the cot her mother in law i.e. accused poured kerosene on her person and she was set on fire with lighted match stick. During the course of recording of this dying declaration the doctor who was on duty viz. Sunit Kumar was present there. Accordingly, the Special Executive Magistrate obtained necessary endorsement of the doctor on the said dying declaration and sent the Marathi translation of dying declaration to Police

as asked by them. On that day when the mother of deceased made query with deceased she told that her mother in law poured kerosene on her person and she was set on fire. Same story was also given by deceased to her brother Rajendra Prasad. Sudhadevi, mother of the deceased therefore lodged a complaint with police and crime was registered for the offence punishable under section 498A & 307 of I.P.C. Police then visited the place of offence on 20-12-1986 and drew the panchanama of the place of offence and attached the half burnt blouse and saree from the place of offence and sent the attached articles to C.A. Deceased however succumbed to the burn injuries on 21-12-1986. Naturally crime was also registered under Section 302 of IPC. Then the dead body was sent for post mortem. After obtaining post mortem report and completing the investigation Police submitted the charge sheet against the accused for the offence punishable under Section 498A and 302 of IPC in the Court of J.M.F.C., Palghar. Finding that accused is charge sheeted for the offence punishable under Section 302 of IPC which is exclusively triable by Sessions Court he committed the case to Sessions Court, Thane. The Sessions Judge, Thane framed charge Exh.3 against the accused for the offences mentioned above. The charge was read over and explained to the accused. The accused pleaded not guilty and claimed to be

tried.

4. In order to bring home the guilt of the accused the prosecution examined as many as 6 witnesses consisting of PW 1- Muralidhar Venkateshwaran - Exh.10, Special Executive Magistrate, Mahadeo G. Gawade, Exh.13, mother of deceased, Sudhadevi Tiwari, Exh.27, brother of deceased, Rajendra Prasad Tiwari, Exh.29, PSI Prakash Salunkhe Exh.30 and PSI Sunil Gharat Exh.36. Prosecution also produced pnachanama of the place of offence Exh.19, C.A. report Exh.22, post mortem report Exh.20. Dying declaration Exh.15. Defence did not adduce any evidence. From the questions put to the PWS as well as from the statement of accused recorded under Section 313 of Cri.Procedure Code it appears that the defence of the accused was of total denial.

5. After considering the evidence on record the learned Sessions Judge came to the conclusion that the prosecution has failed to prove the charge under Section 498A of IPC. He found that there was sufficient evidence to establish that accused caused homicidal death of deceased and thus committed an offence punishable under Section 302 of IPC. Naturally he passed order of conviction and sentence as mentioned above.

6. Being aggrieved by the said order, the accused has filed this appeal. In this appeal before us Shri Hudlikar, learned Advocate for the accused has urged 3 points. Firstly, he submitted that the prosecution case rests solely on the circumstantial evidence and mainly on the evidence of dying declarations. He submitted that dying declarations on record are contradictory and inconstant with each other and written dying declaration recorded by Mahadeo Gawade, Special Executive Magistrate is not recorded in the language of the maker and as such it is not safe to rely upon the same. Secondly, he canvassed before us that there is no corroboration to the above mentioned three dying declarations. Lastly he submitted that from the material on record it appears that at the relevant time deceased was suffering from giddiness and as such she was not in a position to know as to how she caught fire. He further submitted that there is no cogent and convincing evidence against the accused and prosecution has failed to establish the charge. He therefore, submitted that appeal be allowed and accused be acquitted.

7. As against this the learned APP supported the judgment and order passed by the learned trial Judge.

8. It is an admitted fact that marriage of deceased Anita had taken place with Chandrakishor on 4-3-1984 and thereafter she was residing along with her husband and mother in law at Palghar. It is also not in dispute that on 16-1-1986 in the evening she had been to doctor and on returning

home at about 7-30 p.m.she sustained burn injuries as a result of which she was taken to KEM Hospital, Parel. It is also an admitted fact that her parents were informed about her burn injuries and accordingly they had arrived at the hospital on 17-12-1986. It is also not in dispute that on 19-12-1986 Anita had regained consciousness but she succumbed to burn injuries on 21-12-1986. If we see the post mortem report and in particular the cause of death given by doctor, it is very clear that she died due to development of toxemia, as a result of burn injuries.

9. The main and material question is whether death of Anita is suicidal or homicidal. From the evidence on record it appears that it is nobody’s case that Anita committed suicide. It is pertinent to note that it is nowhere suggested by the defence that it was suicidal death. An attempt was made to show that it was an accidental death. However, this question can be decided only after considering the entire evidence on record.

10. The prosecution is mainly relying on 3 dying declarations, two of which are oral and one is written. First oral dying declaration is made by deceased to her mother Sudhadevi. Witness Sudhabai (Exh.2) has clearly stated on oath that on 19-12-1986 at about 3-00 p.m. when she asked her daughter as to how she sustained burn injuries she told her that on that day her mother in law set her on fire. On the same day at about 4-00 p.m. Rajendra Prasad, brother of deceased Anita asked her as to how she sustained burn injuries and at that time Anita told him that she had been to the doctor in the evening. On returning home she was lying on the cot as she was feeling giddy and at that time her mother in law sprinkled kerosene on her and set her on fire with lighted match stick.

11. Shri Hudlikar, learned Advocate for the accused argued before us that the alleged statement or dying declaration made by deceased before Sudhadevi is very cryptic. It is true that she has not given any details about the said incident but has stated the material things. It must be noted that Sudhadevi has stated that after Anita told that her mother in law set her on fire she started weeping and as a result of the same she could not tell any further and she (Sudhadevi)

also did not ask anything more. It was but natural. Sudhadevi was also unable to control her emotions after seeing the condition of Anita and as such left the room. Thus taking into consideration this situation merely because Anita has not given any other details to Sudhadevi at that time, we cannot jump to the conclusion that Anita must not have said anything to Sudhadevi.

12. So far as P.W.4 Rajendra Prasad Tiwari Exh.29, the brother of the deceased is concerned, he has clearly stated that Anita told him that when she returned from the doctor and was lying on the cot her mother in law poured kerosene and set her on fire. In cross examination he has stated that he did not pass on this information to other family members. Relying on this admission it was tried to be canvassed before us that conduct of Rajendra Prasad is unnatural and as such his evidence should not be believed. However, if we carefully go through the deposition of Rajendra Prasad we find that he has clearly stated therein that he was knowing that Anita has already told about the incident to his mother and father so under such circumstances there was in fact no necessity for Rajendra Prasad to tell about the incident to anyone else. So merely because he did not tell the information to other members we cannot discard his testimony.

13. The prosecution witness Mahadeo Gawade, Special Executive Magistrate Exh.13 has also stated that on 19-12-1986 at about 5-00 p.m. he went to KEM Hospital, Parel and after reaching near the injured Anita, first he made enquiry about her physical condition and as the doctor told him that patient is conscious and he also noticed that she was in a position to make a statement he asked her as to how she sustained injuries and thereafter whatever was told ,by her was recorded by him. He has clearly stated that he asked the questions to Anita in Hindi, she replied the same in Hindi but as the language of the Court is English he recorded dying declaration in English. He has also stated that thereafter he gave Marathi translation of the same to Police as asked by them. Shri Hudlikar submitted that original dying declaration is not before the Court. However, it must be noted that in the instant case we cannot say that original dying declaration is not before the Court. The answers given by Anita have been recorded by Special Executive Magistrate in English. He has further stated that after the dying declaration was over he again read over the same to Anita and explained it in Hindi and after she confirmed that the same was as per her say obtained her thumb impression. If we see document at Exh.14, we find that it

bears the thumb impression of Anita. It also bears the necessary endorsement of doctor Sumit Kumar. So, all that can be said is that though the questions and answers were in Hindi, Special Executive Magistrate recorded the statement in English, instead of Hindi. The question arises whether this infirmity is fatal to the prosecution. Whether merely because it is recorded in English it can be said that it is not the correct version of what has been deposed by deceased. We are of the view that merely because the statement has been reduced to writing in English it cannot be said that it has lost its evidential value. In fact for this proposition we can place reliance on a case The State of Maharashtra V/s Gopalchand Uttamchand Keswani reported in 1985(1) Bom.C.R. 559 wherein also the questions were asked in Hindi and answers were given in Hindi but dying declaration was recorded in Marathi. While considering the said dying declaration this court held that merely because it is recorded in a different language it cannot be said that it has lost its evidential value. Not only that but even in a case Tehal Singh V/s State of Punjab, AIR 1979 SC 1347, wherein in the questions were asked in Punjabi language, the answers were also given in Punjabi, however, the dying declaration was recorded in Urdu, Apex Court held that the said dying declaration cannot be

discarded merely on the fact that it has not been actually recorded in the language which is used by the maker. So, in the instant case also we do not think that there is any infirmity in the dying declaration on record which will create any doubt about its genuineness.

14. In this dying declaration at Exh.14 we noticed that the deceased has narrated the overacts of the accused by saying that on that day at the relevant time when deceased was lying on the cot the accused poured kerosene on her person and set her on fire. Thus we find that oral and written dying declarations are consistent with each other. Shri Hudlikar, learned Advocate for the accused argued before us that brother of sister Rajendra Prasad has said that at the relevant time the deceased was feeling giddy and as such she must not be in a position to understand as to what exactly happened and who poured kerosene. Firstly, it must be noted that there is no reference regarding giddiness in the written dying declaration. Besides this merely because she was feeling giddiness it cannot be said that she was not in a position to understand as to what was happening around her. So, we do not find any substance in the argument advanced by the learned Advocate for the defence in this behalf.

15. There is another peace of evidence which lends corroboration to the dying declaration in question. It is an admitted fact that when panchanama of the place of offence was drawn, half burnt blouse and saree of deceased were attached from the said place and accordingly panchanama Exh.19 was drawn. The said saree and blouse were sent to C.A. The C.A. observed in Exh.22 "kerosene - residues on Exh.No.1 and 2 (saree and blouse) are possible." Shri Hudlikar, learned advocate tried to argue before us that word "possible" indicates that even the C.A. was not positive in opinion. However the fact remains that when he has said that kerosene residue possible, it obviously means that there was some indication of kerosene residue. So, this also corroborates the dying declarations mentioned above. From the above mentioned evidence, it is very clear that death of Anita was homicidal and not accidental.

16. The law regarding dying declaration is well settled. Once the dying declaration is found to be true then the same can be relied upon and acted upon even without any corroboration. It has been so held in Tarachand Damu Sutar V the State of Maharashtra AIR 1962 SC 130. In the present case we have already mentioned above that there is some

corroboration to the dying declaration in question. It is clear from the evidence on record that dying declarations have been made by the deceased voluntarily without any pressure or influence on her. In fact it is not even suggested to any of the witnesses that anybody had tutored Anita. So taking into consideration the entire evidence on record and position of law, we have no hesitation to hold that the learned trial Court has rightly appreciated the evidence on record and has correctly held that the prosecution has proved the charge under Section 302 of I.P.C. levelled against the accused. We, therefore, feel that there is no necessity to interfere with the decision of the lower Court. The order of conviction and sentence passed by the Sessions Judge, Thane in Sessions Case NO.645 of 1987 against the accused for the offence punishable under Section 302 of IPC is confirmed.

. Hence the appeal is dismissed.

. At this stage the learned Advocate for the accused submitted that at present the Appellant accused is ill and as such time to surrender be granted. Hence accused to surrender her bail within four weeks from today.

. The accused is entitled to get set off for the

period of detention undergone as per Section 428 of Cri.P.C.

(S.S.PARKAR, J)

(S.R.SATHE,J.)

S. R. SATHE,JJ.

DATED:7th October 2004

P.C.:-

. For the reasons recorded separately in the Oral judgment, the Court passes the following order :

. So taking into consideration the entire evidence on record and position of law, we have no hesitation to hold that the learned trial Court has rightly appreciated the evidence on record and has correctly held that the prosecution has proved the charge under Section 302 of I.P.C. levelled against the accused. We, therefore, feel that there is no necessity to interfere with this appeal. The order of conviction and sentence passed by the Sessions Judge, Thane in Sessions Case NO.645 of 1987 against the accused for the offence punishable under Section 302 of IPC is confirmed.

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(S.S.PARKAR, J)

(S.R.SATHE, J.)